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Don Nickles, Chairman Doug Badger, Staff Director 347 Russell Senate Office Building (202)224-2946 http://www.senate.gov/~rpc/

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The History of Habeas Corpus — And Why Reform Is Required

The writ of habeas corpus, sometimes referred to as the "Great Writ," was regarded in the common law as an important bulwark of personal liberty, assuring an individual subject to detention or confinement that he could obtain judicial review of its legality. The importance of the writ was recognized by the Framers, who included in the Constitution (Art. I, sec. 9, cl. 2) the provision that "[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public safety may require it."

When the Constitution was enacted, however, it was universally understood that an application for habeas corpus could ***not*** *be employed to secure additional review of an order or judgment* ***of a court*** *of competent jurisdiction. The function of the writ was essentially that of ensuring that a person detained pursuant to* ***executive authority*** *could obtain a* ***judicial determination*** *of the detention's legality.*

The habeas corpus reform that is pending is *not* addressed to the historical function of the Great Writ, but to the results of much later developments.

Following the creation of the United States, the availability of habeas corpus in the federal courts was initially restricted to federal prisoners, and the common law limitations on the scope of the writ were observed. The habeas corpus jurisdiction of the federal courts was extended *by statute* in 1867, however, and the traditional restrictions on the scope of the writ were gradually eroded thereafter by court decisions. The end result of this development was that federal habeas corpus became routinely available only in the 1950s and 1960s as a means for reviewing state criminal judgments on grounds of alleged deprivations of federal rights.

It is the present character of federal habeas corpus — where the writ has become a quasi-appellate process by which lower federal courts review state judgments — that has given rise to the need for reform. The shortcomings of the present system are aptly summarized in a passage from the leading treatise on federal procedure:

> "The most controversial and friction-producing issue in the relation between the federal courts and the states is federal habeas corpus for state prisoners. Commentators are critical of its present scope, federal judges are unhappy at the burden of thousands of mostly frivolous petitions, state courts resent having their decisions reexamined by a federal district judge, and the Supreme Court in recent terms has shown a strong inclination to limit its availability. Meanwhile, prisoners thrive on it as a form of occupational therapy and for a

few it serves as a means of redressing constitutional violations." Wright, Miller & Cooper, *Federal Practice and Procedure: Jurisdiction* §4261 (1978).

The disaffection of state officials, including state judges and state attorneys general, with the present system of federal habeas corpus has been amply confirmed. Moreover, federal judges have been equally emphatic in their calls for reform. Judge Henry Friendly of the Second Circuit Court of Appeals, for example has characterized the present system of collateral attack as "a gigantic waste of effort." Judge Carl McGowan of the D.C. Circuit has stated similarly:

> "A matter that has rankled relations between state and federal courts for some years now is the collateral attack on final state criminal convictions. . . . A state prisoner who has unsuccessfully exhausted his avenues of state trial and appellate relief can, even many years later when retrial is not practically feasible, attack that conviction in the federal district court as violative of federal law, and procure his release if such a violation is established. Since the same claim of federal law violation can [be], and often is, made in the trial and appellate courts of the state, with certiorari review available in the Supreme Court, the state judges understandably have some difficulty in seeing why their work should be reexamined in the federal courts whenever a colorable claim of violation is alleged. . . .
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> "The early finality of criminal convictions is generally desirable, and especially so when that can be assured without duplication of judicial effort. The resources of the federal courts at the present time are strained by their own criminal caseloads. They should not have to exercise a supervisory authority over the administration of state criminal laws unless that is plainly necessary in the interest of justice." McGowan, "The View from an Inferior Court," 19 *San Diego L. Rev.* 659, 667-68 (1982).

Substantially the same sentiments have been expressed at the highest level of the judiciary. A majority of the Justices of the Supreme Court have strongly criticized the current system of federal habeas corpus and have called for basic limitations on its scope and availability. Chief Justice Burger, for example, has urged Congress to consider restricting narrowly the availability of federal habeas corpus for state prisoners, stating that "[t]he administration of justice in this country is plagued and bogged down with lack of reasonable finality of judgments in criminal cases." 1981 *Year-End Report on the Judiciary* 21. Justice Stevens has also asserted that "[i]n recent years federal judges at times have lost sight of the true office of the great writ of habeas corpus," *Rose v. Lundy*, 455 U.S. 509, 546 (1982) (Stevens, J., dissenting), and Justice Powell has observed:

> "[T]he present scope of habeas corpus tends to undermine the values inherent in our federal system of government. To the extent that every state criminal judgment is to be subject indefinitely to broad and repetitious federal oversight, we render the actions of state courts a serious disrespect in derogation of the constitutional balance between the two systems." *Schneckloth v. Bustamonte*, 412 U.S. 218, 263 (Powell, J., concurring).

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